A

ACUMEN SCIENTIFIC SDN BHD v. YEOW LIANG MING

COURT OF APPEAL, PUTRAJAYA
ZALEHA YUSOF JCA
HASNAH MOHAMMED HASHIM JCA
HAS ZANAH MEHAT JCA
B [CIVIL APPEAL NO: P-02(NCVC)(W)-1618-08-2018]
27 DECEMBER 2019

COMPANY LAW: *Directors – Breach of fiduciary duties – Allegation of – Defendant signed confidentiality agreement and conflict of interest agreement when*
C *first employed – Defendant subsequently transferred to an associate company or subsidiary within same group of companies – Whether defendant bound by terms of two agreements despite separate legal entities of companies – Defendant resigned and formed company having similar business – Whether evidence showed conduct of defendant contravened terms of agreements – Whether defendant owed plaintiff*
D *fiduciary duty to act bona fide in interests of plaintiff*

The appellant ('plaintiff') was a member of the Texchem Group of Companies ('Texchem Group') which provides laboratory analytical testing and consultancy services in the field of chemistry. By a letter of appointment, the respondent ('defendant') was appointed by Fumakilla Malaysia Berhad
E ('Fumakilla') as a chemist. One of the terms of appointment was that he may be transferred to any of the associate companies or subsidiary within the Texchem Group. During his tenure with Fumakilla, the defendant entered into two agreements (i) a confidentiality agreement; and (ii) a conflict of interest agreement. Subsequently, the defendant was transferred to the
F plaintiff and was promoted several times until he was appointed as a Working Director of the plaintiff. Some time later, the defendant tendered his resignation, and five months after his resignation, the defendant joined Amcen Lab Sdn Bhd ('Amcen') as its General Manager. The plaintiff's case against the defendant was for breach of the two agreements executed and
G breach of fiduciary duty. It was contended by the plaintiff that the defendant at all material times was bound by the terms of the confidentiality agreement and the conflict of interest agreement which he had executed earlier. It was further contended by the plaintiff that the defendant had breached his fiduciary duties by disclosing and making use of the plaintiff's confidential information, and had utilised the confidential information for his personal
H interest to the detriment of the plaintiff's interest. According to the plaintiff, from 23 December 2014 until 12 January 2015, the defendant had used the plaintiff's property, a laptop, to communicate and receive emails relating to Amcen's operation using his personal email address. The plaintiff further alleged that the defendant himself had registered the website
I 'amcen.com.my' on behalf of Amcen as administrator and billing person of that website when he was still under the plaintiff's employment. The plaintiff went on to submit that the defendant enticed or attempted to entice or solicit,

either directly or indirectly, the plaintiff's existing customers. As the General Manager and Working Director of the plaintiff, the defendant had breached his fiduciary duties as an employee of the plaintiff and as a result, the plaintiff contended that it had suffered losses. Thus, the plaintiff claimed against the defendant for reliefs and damages. The defendant categorically denied the claim and contended that he was not bound by the terms of the two agreements. The High Court found that the defendant was not bound by both the said agreements and opined that the defendant did not breach his fiduciary duties with the plaintiff. The High Court dismissed the plaintiff's suit and allowed the defendant's counterclaim. Hence, this appeal by the plaintiff. The issues that arose were, *inter alia*, (i) whether Fumakilla and the plaintiff were separate entities that could give any legal effect to the two agreements; (ii) whether the defendant was bound by the terms of the confidentiality agreement and the conflict of interest agreement even though he was transferred to another company; and (iii) whether the defendant breached his fiduciary duties.

Held (allowing appeal with costs):

(1) When the defendant was first employed by Fumakilla, he was required to execute the confidentiality agreement. The terms of employment based on the letter of offer was accepted by the defendant prior to the execution of the confidentiality agreement. The defendant was therefore fully aware when he accepted the offer of employment with Fumakilla and subsequently executed the confidentiality agreement that Fumakilla was one of the companies under the Texchem Group; one of the terms of condition of his employment was that he may be transferred to any of the companies within the Texchem Group. (paras 22 & 23)

(2) It was further stipulated in the conflict of interest agreement that conflict of interest policy outlines the parameters of the interest for the employees of the Texchem Group. The purpose was to establish a standard of conduct to ensure that personnel in any of the company under the Texchem Group act in the best interest of the company maintaining standards relating to conflict of interest and to enhance public confidence in the integrity of the Group. The defendant not only signed the conflict of interest agreement but was aware of the company's policy and the required strict adherence to the terms of the agreements. He was a General Manager and a Director of the plaintiff, not a low ranking officer or staff in the company. As the General Manager and Director he would know or he should know the consequence of any conduct or act of breach of confidentiality. The defendant was bound by the terms of the conflict of interest agreement as the plaintiff was a company under the Texchem Group. (paras 26 & 27)

(3) The confidentiality agreement and the conflict of interest agreement must not be read in isolation but must be read together with the terms of employment and any other contemporaneous documents relating to

A the defendant's employment under any of the companies of the Texchem Group. Despite the separate legal entities of the companies within a group, the defendant was bound by the terms of the agreements. It is trite law that construction of the terms of an agreement is a matter of law and whatever may be the understanding of the parties with regard to their B subjective intention, it was for the court to determine their objective intention based on the terms and conditions stipulated in the agreements after taking into consideration the surrounding background facts and circumstances. (paras 28 & 32)

(4) The defendant was entrusted with all of the plaintiff's confidential C information, *ie*, list of competitors, budget and performance, sales operations, management and strategic planning *etc*. In clear contravention of the terms of the agreements, the defendant failed to disclose his close family relationship with Amcen and also utilised business information of the plaintiff in setting up his company with his D brothers-in-law and sister, a company having similar business as the plaintiff whilst still under the employment of the plaintiff. Upon perusal and scrutiny of the contemporaneous documents, it was quite clear that the High Court did not accord sufficient judicial appreciation of the evidence placed before it and failed to take into account the factual matrix which formed the background of the agreements executed and the E conduct of the defendant as an employee of the plaintiff. The decision reached by the High Court Judge was thus plainly wrong. (paras 29 & 30)

(5) The defendant owed the plaintiff a fiduciary duty not only as the F General Manager but as a Working Director of the plaintiff. He was reposed with trust and confidence to discharge his duties, responsibilities and functions honestly, in good faith and in the best interest of the plaintiff. The essence of the fiduciary duty is a duty to act *bona fide* at all times in the interests of the company and not for a collateral purpose. This the defendant failed to exercise and his failure G to do so was a blatant breach of his fiduciary duties. (paras 37 & 38)

(6) The defendant had breached not only both the agreements but his fiduciary duties as a director of the plaintiff by failing to disclose and making use of the plaintiff's confidential information. Furthermore, the H defendant never denied that as an employee of the plaintiff, he could not divulge any of the affairs, secrets of the plaintiff, its personnel, financial status, management and administration, accounts, creditors, debtors, marketing and distribution, production and other matters concerning the business of the plaintiff to any other company, person or persons or any other company within the Texchem Group without the previous consent I in writing of the plaintiff. The High Court Judge had erred in failing to appreciate and consider the principles of fiduciary and whether the

defendant as a fiduciary had breached his fiduciary duties as a Working Director and as a senior employee of the plaintiff. Appellate intervention was thus warranted. (paras 41-44)

Case(s) referred to:

Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***
Brickenden v. London Loan and Savings Co [1934] 3 DLR 465 ***(refd)***
Bristol and West BS v. Mothew [1998] Ch 1 ***(refd)***
Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 WLR 896 ***(refd)***
Ng Pak Cheong v. Global insurance Co Sdn Bhd [1995] 1 CLJ 223 HC ***(refd)***
Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor [1997] 1 CLJ 529 FC ***(refd)***

For the appellant - Pravin Kaur Jessy & Mohamad Akmar Mohd Ghouse; M/s Jessy & Assocs
For the respondent - Cheng Theng Keat & Goh Chee Sun; M/s Cheng Lee & Goh

[Editor's note: Appeal from High Court, Pulau Pinang; Civil Case No: PA-22NCVC-78-05-2016 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Hasnah Mohammed Hashim JCA:

[1] This appeal by the appellant is against the decision of the High Court which had dismissed the appellant's claim and allowed the respondent's counterclaim for bonus and director's fees for the year 2014. Her Ladyship further ordered the bonus and the director's fees for the year 2014 to be assessed.

[2] For the purpose of this judgment, the parties will be referred to as they were in the High Court.

Material Facts

[3] The plaintiff is a member of the Texchem Group of Companies which provides laboratory analytical testing as well as consultancy services in particular, in the field of chemistry.

[4] By a letter of appointment dated 1 July 1998, the defendant was appointed by Fumakilla Malaysia Berhad ('Fumakilla') as a chemist on 1 July 1998. One of the terms of appointment was that he may be transferred to any of the associate companies or subsidiary within the Texchem Group:

> **Transfer**
>
> It is a term and condition of employment that you may be transferred to any of the subsidiary or associate Companies within the Texchem Group.
>
> [See: page 623 Common Bundle of Document (CBD)].

[5] During his tenure with Fumakilla, the defendant entered into two agreements:

(i) Confidentiality agreement dated 9 August 1999 (See: record of appeal vol. 2C; p. 684); and

(ii) Conflict of interest agreement (Form 10A) dated 7 September 2007 (See: record of appeal vol. 2C: p. 687).

[6] On 1 July 2009 the defendant was transferred to the plaintiff, a company within the Texchem Group of Companies and promoted to the position of Assistant General Manager:

> Dear Mr Yeow
>
> **Transfer**
>
> The Company is pleased to advise that you will be transferred from FUMAKILLA MALAYSIA BERHAD to ACUMEN SCIENTIFIC SDN BHD with effect from 01 JULY 2009 …

[7] This was followed by another promotion in the same company as a General Manager with a further salary increment effective 1 January 2010 (See: letter dated 1 January 2010; p. 544 CBD). On 1 January 2011, the defendant was appointed as a Working Director of the plaintiff. The only terms revised were in respect of bonus and salary.

[8] Four years later, on 6 November 2014, the defendant tendered his resignation, giving three months' notice, the last day of service being on 5 February 2015. Five months after his resignation, the defendant joined Amcen Lab Sdn Bhd ('Amcen') as its General Manager.

[9] The plaintiff's case against the defendant is for breach of the two agreements executed and breach of fiduciary duty. It is contended by the plaintiff that the defendant at all material time was bound by the terms of the confidentiality agreement and the conflict of interest agreement which he had executed earlier. It was further contended by the plaintiff that the defendant breached his fiduciary duties by disclosing and making use of the plaintiff's confidential information, and had utilised the confidential information for his personal interest to the detriment of the plaintiff's interest.

[10] According to the plaintiff, from 23 December 2014 until 12 January 2015, the defendant used the plaintiff's property, a Dell latitude E4300 laptop to communicate and receive emails relating to Amcen's operation using his personal email address. In his capacity as Associate Consultant of Amcen, the defendant had also conducted an evaluation and monitoring of Dynacraft Industries Sdn Bhd between 3 July 2014 and 4 July 2014. It was also alleged that on 2 September 2014 the defendant's sister, Yeow Bee Hsia, assisted in generating email addresses for Amcen created for the defendant when he was still an employee of the plaintiff. The plaintiff further alleged that the defendant himself had registered the website 'amcen.com.my' on

behalf of Amcen as administrator and billing person of that website when he was still under the plaintiff's employment. The plaintiff further alleged that the defendant enticed or attempted to entice or solicit, either directly or indirectly, the plaintiff's existing customers. As the General Manager and Working Director of the plaintiff, the defendant breached his fiduciary duties as an employee of the plaintiff and, as a result, the plaintiff contended that it had suffered losses.

[11] The plaintiff's claim against the defendant was for breach of fiduciary duties and sought the following reliefs:

(i) return of all of the plaintiff's confidential information;

(ii) delete, erase, remove, uninstall and/or destroy all of the plaintiff's confidential information stored on hard drives discs etc in the possession, custody and control of the defendant;

(iii) to account for all or any profits obtained by reason of the breach of contract of service and/or breach of conflict of interest and/or breach of fiduciary duties;

(iv) general damages to be assessed;

(v) aggravated and exemplary damages;

(vi) specific damages in the sum of RM117,688.60; and

(vii) interest.

[12] The defendant categorically denied the claim and contended that he was not bound by the terms of the two agreements. He filed a counterclaim against the plaintiff and sought payment of director's fees and bonus for the year 2014 to be assessed by the court.

The High Court

[13] The learned High Court Judge found that the defendant was not bound by both of the agreements that is, the confidentiality agreement and conflict of interest agreement. Her Ladyship opined that the defendant did not breach his fiduciary duties with the plaintiff and dismissed the plaintiff's suit and allowed the defendant's counterclaim for director's fees and bonus to be assessed by the court.

The Submissions Before Us

[14] It was submitted by learned counsel for the plaintiff that the High Court Judge erred in law and fact when Her Ladyship failed to appreciate the following:

(i) In a contract of employment, there is an implied term that the employee has a fiduciary duty to his employer;

(ii) In a contract of employment, the employee has an implied duty of loyalty to his employer; and

(iii) Even though Fumakilla and the plaintiff are separate legal entities, the companies are part of the Texchem Group. When the defendant was transferred from Fumakilla to the plaintiff, it was a transfer between the companies under the group and therefore there was no break in service. Both the agreements did not expire as contended but continued to be in force and the terms applicable to the defendant.

[15] The defendant as the General Manager and Working Director of the plaintiff was entrusted with the plaintiff's confidential information for eg, list of competitors, budget and performance, sales, operations, management and strategic planning, cash flow etc. The forensic analysis of the defendant's company showed that the defendant had Amcen's company brochure in his computer including Amcen's delivery orders, invoices, quotations all of which were dated in September 2014. The defendant had copied the plaintiff's confidential documents which included business plan, marketing plan, annual appraisal for the purposes of Amcen. The defendant did not inform the plaintiff as required that his brothers-in-law were the shareholders of Amcen. Learned counsel for the plaintiff argued that the defendant had clearly breached his fiduciary duties towards the plaintiff when he utilised the information of the company for the benefit of the company he had helped set up.

[16] On the other hand, learned counsel for the defendant submitted that the learned High Court Judge had considered the evidence, both oral and documentary and correctly decided that the two agreements were not binding on the defendant. Fumakilla and the plaintiff are two distinct legal entities even though both companies are within the Texchem Group of Companies. Furthermore, it was argued that the Texchem Group of Companies itself is not a legal entity. Therefore, the plaintiff has no legal right to enforce the two agreements and initiate this claim against the defendant as the agreements were both executed before the defendant joined the plaintiff.

Our Decision

[17] Before us, learned counsel for the plaintiff submitted that the appeal ought to be allowed because the decision was plainly wrong and appellate intervention was necessary to correct the injustice occasioned to the plaintiff. Contrary to the learned judge's findings, it was argued by learned counsel for the plaintiff, the plaintiff had successfully established its case and had proved the breach of fiduciary duty and damages had resulted from such breach. Not only were there erroneous findings of fact, it was also submitted that the learned judge had applied the wrong principles of law.

[18] The issues before the learned judge were as follows:

(i) Whether Fumakilla and the plaintiff are separate entities that can give any legal effect to the two agreements, that is the confidentiality agreement dated 9 August 1999 and the conflict of interest agreement dated 7 September 2007 executed by the defendant with Fumakilla;

(ii) Whether the defendant was bound by the terms of the confidentiality agreement and the conflict of interest agreement even though he was transferred to another company;

(iii) Whether the court can accept the forensic report dated 12 January 2016 as evidence;

(vi) Whether the defendant breached his fiduciary duties;

(vii) Whether there is restraint of trade; and

(viii) Whether the defendant had proved his counterclaim.

[19] The defendant, however argued that the decision by the High Court was correct in law and in facts and that there was absolute lack of substantiation and that there was absolutely no reason for appellate intervention. It was further emphasised by learned counsel for the defendant that the learned judge had made sufficient consideration, appreciation and assessment of the facts and evidence before her.

[20] The learned High Court Judge dealt with the following issues together:

(i) whether Fumakilla and the plaintiff are separate entities; and

(ii) if so, whether the defendant was bound by the terms of the agreements once transferred to another company.

[21] Her Ladyship opined that the two agreements were not binding on the defendant giving the following reasons in her grounds of judgment:

> 34. Di dalam surat arahan perpindahan ini, cuma dinyatakan bahawa bonus dan gaji Defendan akan disemak. Tidak terdapat apa-apa klausa yang menyatakan bahawa Defendan sepatutnya terikat dengan Perjanjian bertarikh 9.8.1999 dan Perjanjian bertarikh 7.9.2007.
>
> 35. Jika Plaintif berniat untuk mengikat Defendan dengan Perjanjian bertarikh 9.8.1999 dan Perjanjian bertarikh 7.9.2007, Plaintif seharusnya menyatakan dengan jelas yang Plaintif ingin mengikat Defendan dengan Perjanjian bertarikh 9.8.1999 dan 7.9.2007.
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> 36. Surat arahan pertukaran Defendan tidak dengan nyata menyatakan yang Defendan terikat dengan Perjanjian bertarikh 9.8.1999 dan 7.9.2007.
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> 37. Tambahan pula Plaintif dan Fumakilla mempunyai entiti yang berlainan walaupun berada dalan (*sic*) satu kumpulan Texchem. Saya juga dapati bahawa tidak terdapat apa-apa dokumen daripada Plaintif atau Fumakilla untuk menunjukkan Perjanjian bertarikh 9.8.1999 dan 7.9.2007 akan mengikat Defendan apabila beliau diarahkan bertukar ke pejabat Plaintif.
>
> 38. Jadi, pihak Plaintif dan Fumakilla, tidak mempunyai entiti undang-undang yang sama. Manakala Kumpulan Texchem (Texchem Group) bukan merupakan entiti undang-undang, maka apa-apa perjanjian yang diniatkan untuk mengikat mana-mana pihak di dalam kontrak berkenaan maka hendaklah dinyatakan dengan jelas dan nyata dan tidak seperti keadaan kes ini.

A 39. Bila Defendan melaksanakan Perjanjian bertarikh 9.8.1999, Perjanjian tersebut dikeluarkan oleh Fumakilla.

40. Memandangkan Plaintif dan Fumakilla adalah syarikat yang mempunyai entiti undang-undang yang berlainan, maka Perjanjian bertarikh 9.8.1999 itu tidak boleh dikuatkuasakan lagi terhadap Defendan B bila Defendan dipindahkan dari Fumakilla ke Syarikat Plaintif.

41. Sekiranya pun Perjanjian bertarikh 9.8.1999 itu mengikat Defendan, Perjanjian tersebut tidak lagi boleh dikuatkuasakan terhadap Defendan kerana Perjanjian tersebut tamat penguatkuasaannya selepas 3 tahun Defendan dipindahkan ke Syarikat Plaintif. Klausa 4, Perjanjian bertarikh 9.8.1999 itu menyatakan: C

> This Agreement shall remain and continue to be in full force and effect for three (3) years after the Employee has left the employment of the Company.

42. Dengan itu, Perjanjian bertarikh 9.8.1999 tidak mengikat Defendan.

D 43. Perjanjian bertarikh 7.9.2007 telah ditandatangani oleh Defendan tetapi tidak dikeluarkan dengan surat daripada Fumakilla. Kepala surat ini cuma tertera logo Texchem dan pada muka surat 152, Ikatan F tertera pula nama Texchem Corporation Sdn. Bhd.

44. Perjanjian ini dikeluarkan atas entiti undang-undang dari Texchem E Corporation Sdn. Bhd. dan Syarikat ini mempunyai entiti undang-undang yang berlainan daripada Plaintif dan Fumakilla.

45. Pada masa Perjanjian bertarikh 7.9.2007 dikeluarkan, Defendan bertugas dengan Fumakilla. Maka dengan adanya entiti undang-undang yang berlainan bagi syarikat-syarikat yang dinyatakan, maka Perjanjian F bertarikh 7.9.2007 ini tidak mengikat Defendan.

46. Tambahan lagi, mengikut keterangan SP1 dan SP6 semasa Defendan tandatangani Perjanjian bertarikh 7.9.2007 ini, Plaintif belum lagi ditubuhkan maka dengan itu Perjanjian bertarikh 7.9.2007 ini tidak mempunyai apa-apa kesan undang-undang ke atas Defendan selepas beliau dipindahkan kepada Syarikat Plaintif kerana Perjanjian bertarikh G 7.9.2007 itu tidak mempunyai hubung kaitnya dengan Plaintif.

47. Jadi, dengan alasan-alasan yang dinyatakan, saya dapati Perjanjian bertarikh 7.9.2007 tidak mengikat Defendan.

The Confidentiality Agreement Dated 9 August 1999 And The Conflict Of Interest H *Agreement Dated 7 September 2007*

[22] When the defendant was first employed by Fumakilla, he was required to execute the confidentiality agreement. Clause 1 of the confidentiality agreement dated 9 August 1999 stipulates as follows:

> The employee hereby undertakes and agrees with the Company that he/ I she will not at any time either during the continuance of his/her employment with the Company or thereafter:

(a) divulge any Technical Information which he/she may already have been acquired or hereafter acquire during or in the course of his/her employment with the Company to any other company, person or persons without the previous consent in writing of the Company;

(b) divulge any of the affair or secret of the Company or any other company, person or persons without the previous consent in writing of the Company;

(c) divulge any information of any kind whatsoever in relation to the Company as a whole, its personnel, financial status, management and administration, accounts, creditors, debtors, marketing and distribution, production and other matters concerning the business of the Company to any other company, person or persons without the previous consent in writing of the Company;

(d) use or attempt to use any information he/she may already acquire or may hereafter acquire during or in the course of his/her employment with the Company in any manner which may injure or cause loss to or be calculated to injure or cause loss to the Company …

[23] The terms of employment based on the letter of offer was accepted by the defendant on 1 July 1998 (See: pp. 680-681 CBD) prior to the execution of the confidentiality agreement. The defendant was therefore fully aware when he accepted the offer of employment with Fumakilla and subsequently executed the confidentiality agreement that Fumakilla was one of the companies under the Texchem Group of Companies; one of the terms of condition of his employment was that he may be transferred to any of the companies within the Texchem Group:

It is a term of your condition of employment that you may be transferred to any of our subsidiary or associate Companies within the Texchem Group.

[24] In *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269, Gopal Sri Ram FCJ, who delivered the leading judgment of the court stated:

Here it is important to bear in mind that a contract is to be interpreted in accordance with the following guidelines. First, a court interpreting a private contract is not confined to the four corners of the document. It is entitled to look at the factual matrix forming the background to the transaction. Second, the factual matrix which forms the background to the transaction includes all material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. Lastly, the court should adopt an objective approach when interpreting a private contract. See, *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 All ER 98. As Lord Clyde said in *Bank of Credit and Commerce International SA v. Munawar Ali* [2001] 2 WLR 735:

> The knowledge reasonably available to them (that is to say the parties to the contract) must include matters of law as well as matters of fact. The problem is not resolved by asking the parties what they thought they intended. It is the imputed intention of the parties that the court is concerned to ascertain. The parties may well have never applied their minds to the particular eventuality which has subsequently arisen, so that they may never in fact have had any conscious intention in relation to that eventuality. It is an objective approach which is required and a solution should be found which is both reasonable and realistic. The meaning of the agreement is to be discovered from the words which they have used read in the context of the circumstances in which they made the agreement. The exercise is not one where there are strict rules, but one where the solution is to be found by considering the language used by the parties against the background of the surrounding circumstances.

[25] The learned judge, however only considered the terms of the letter of transfer and the non-existence of a specific term or terms in the said transfer letter stipulating that the defendant will be bound by the terms of confidentiality agreement as well as the conflict of interest agreement. The defendant had however declared through the conflict of interest agreement that:

> … my immediate family, relatives and I are **not involved** in managing, operating, controlling, consulting or engaging in any personal businesses that are in conflict of interest with the Company as at the date of this agreement. (emphasis added)

[26] It is also further stipulated in the conflict of interest agreement that conflict of interest policy outlines the parameters of the interest for the employees of the Texchem Group of Companies. The purpose was to establish a standard of conduct to ensure that personnel in any of the company under the Texchem Group of Companies to act in the best interest of the company maintaining standards relating to conflict of interest and to enhance public confidence in the integrity of the Group. The agreement defined 'conflict of interest' as:

> A situation where an employee or his immediate relatives, or the organization he/she represents or has interest in, has a direct or indirect competing interest with the Company's activities. This competing interest may result in the employee being in a position to benefit from the situation or in the Company not being able to achieve a result in the best interest of the Company.

[27] The defendant not only signed the conflict of interest agreement in September 2007 but was aware of the company's policy and the required strict adherence to the terms of the agreements. He was after all the General Manager and a director of the plaintiff and not a low-ranking officer or staff in the company. As the General Manager and director he would know or he

should know the consequence of any conduct or act of breach of confidentiality. Even if the terms of agreement dated 9 August 1999 expired three years after he was transferred from Fumakilla, the defendant is nevertheless bound by the terms of the conflict of interest agreement as the plaintiff is a company under the Texchem Group of Companies.

[28] The confidentiality agreement and the conflict of interest must not be read in isolation but must be read together with the terms of employment and any other contemporaneous documents relating to the defendant's employment under any of the companies of the Texchem Group. In *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896 Lord Hoffman explained the principles to be applied in the interpretation of contract:

> ... I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v. Simmonds* [1971] 1 WLR 1381, 1384-1386 and *Reardon Smith Line Ltd v. Yngvar Hansen-Tangen* [1976] 1 WLR 989, is always sufficiently appreciated.
>
> The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of 'legal' interpretation has been discarded. The principles may be summarised as follows:
>
> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words

A against the relevant background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co Ltd v. Eagle Star Life Assurance Co Ltd* [1995] 1 WLR 1 508.

B

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language,
C the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera SA v. Salen Rederierna AB* [1985] AC 191, 201:

If detailed semantic and syntactical analysis of words in a commercial
D contract is going to lead to conclusion that flouts business common sense, it must be made to yield to business common sense.

[29] The defendant was entrusted with all of the plaintiff's confidential information for eg, list of competitors, budget and performance, sales, operations, management and strategic planning, cash flow etc. In clear
E contravention of the terms of the agreements, the defendant failed to disclose of his close family relationship with Amcen. He had also utilised business information of the plaintiff in setting up his company which again was a clear breach of the terms of the agreement. Taking into consideration the factual matrix of the case and the contemporaneous documents through the
F defendant's efforts, he had set up with his brothers-in-law and sister, a company having similar business as the plaintiff whilst still under the employment of the plaintiff.

[30] Upon perusal and scrutiny of the contemporaneous documents before us, it is quite clear the learned judge did not accord sufficient judicial
G appreciation of the evidence placed before her and failed to take into account the factual matrix which form the background of the agreements executed and the conduct of the defendant as an employee of the plaintiff. We are convinced that the decision reached was plainly wrong as the High Court Judge had failed to sufficiently appreciate the evidence.

H **Separate Legal Entities**

[31] The Federal Court in *Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor* [1997] 1 CLJ 529, opined that the fundamental attribute of a corporate personality is that a corporation is a legal entity distinct from its members, be they individuals or corporate bodies. However, where there are signs of
I separate corporate personalities being used to enable persons to evade their contractual obligations or duties, the court would disregard the notional separateness of companies:

We are in complete agreement with the basic principle of the fundamental attribute of corporate personality, ie, that the corporation is a legal entity distinct from its members, be they individuals or corporate bodies – a principle firmly established since *Salomon v. Salomon & Co.* [1897] AC 22 HL. However, since then, the development of the law has seen numerous deviations from the strict rule of the separate legal entity of the company through cases where the Courts, on the particular facts and circumstances of those cases, found it appropriate and necessary to depart. Thus in cases where there are signs of separate personalities of companies being used to enable persons to evade their contractual obligations or duties, the Court would disregard the notional separateness of the companies. In *Gilford Motor Co. Ltd. v. Horne* [1933] Ch. 935 CA, Horne was formerly the managing director of the plaintiff company, Gilford Motor Co. Ltd. He covenanted not to solicit customers of the plaintiff company within five years from the determination of his employment. However, soon after leaving the plaintiff's employment, he set up J.M. Horne & Co. Ltd. for the sale of spare parts of Gilford vehicles and through which he solicited the plaintiff-company's customers. The Court, on appeal, held that Horne had breached his covenant and granted an injunction against both Horne and his company. In granting the injunction against Horne, Lawrence LJ said: (p. 965)

> In these circumstances, I agree with the finding by the learned Judge that the defendant company was a mere channel used by the defendant Horne for the purpose of enabling him, for his own benefit, to obtain the advantage of the customers of the plaintiff company, and that therefore the defendant company ought to be restrained as well as the defendant Horne.

[32] We are of the firm view having regard to the factual matrix and the evidence before us despite the separate legal identities of the companies within a group, the defendant is bound by the terms of the agreements. It is trite law that construction of the terms of an agreement is a matter of law and whatever may be the understanding of the parties with regard to their subjective intention, it is for the court to determine their objective intention based on the terms and conditions stipulated in the agreements after taking into consideration the surrounding background facts and circumstances.

Fiduciary Duty

[33] The classic definition of a fiduciary was set out by Millet LJ in *Bristol and West BS v. Mothew* [1998] Ch 1 at p. 11 as follows:

> A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third

A person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary.

[34] In the case of *Ng Pak Cheong v. Global insurance Co Sdn Bhd* [1995] 1 CLJ 223; [1995] 1 MLJ 64, the court held that directors owed fiduciary B duties to the company and its shareholders and that they were expected to exercise their powers and discretions for the benefit of the company at all times. Mohamed Dzaiddin FCJ (as he was then) said, at 76-77:

In law, the deceased and other directors of the defendant owe a fiduciary duty to the defendant and its shareholders and they are expected to C exercise their powers and discretions for the benefit of the company at all times. In *Regal (Hastings) Ltd v. Gulliver* [1967] 2 AC 134n; [1942] 1 All ER 378, Viscount Sankey stated ([1967] 2 AC 134n at p 137G; [1942] 1 All ER 378 at p 381) that:

The general rule of equity is that no one who had duties of a fiduciary D nature to perform is allowed to enter into engagements in which he has or can have a personal interest conflicting with the interests of those whom he is bound to protect.

[35] As regards to breach of trust and breach of fiduciary duty in the context of an employee and employer relationship, the employee's duty to E look after the employer's interest, the duty of fidelity towards the principal and the duty to act in good faith, not to make a profit out of the trust, not to place himself in a position where his duty and his interest may conflict and, not to act for his own benefit or for the benefit of a third person without the informed consent of his principal.

F **[36]** As the General Manager, the defendant's main responsibilities were to manage the plaintiff's daily operations and to ensure the continuous development of the plaintiff's business. He was entrusted with a treasure trove of plaintiff's confidential information and critical business information such as market share, sales operations, management, cash flow strategic G planning, and list of customers including competitor's quotations, purchase orders, delivery orders and invoices.

[37] The defendant in the instant appeal before us owed the plaintiff a fiduciary duty not only as the General Manager but as a Working Director of the plaintiff. He was reposed with trust and confidence to discharge his H duties, responsibilities and functions honestly, in good faith and in the best interest of the plaintiff. Walter Woon on *Company Law* states that:

Firstly, a director must act in what he honestly considers to be the company's interests and not in the interests of some other person or body. This is a director's main and overriding duty at common law; Secondly, I a director must employ the powers and assets that he is entrusted with for proper purposes and not for any collateral purpose; Thirdly, a director must not place himself in a position whereby his duty to the company and his personal interests may conflict.

[38] A company director holds a fiduciary relationship with his company and the duty to avoid conflicts of interest and must at all times exercise his powers *bona fide* and in the best interests of the company as a whole. The essence of the fiduciary duty is a duty to act *bona fide* at all times in the interests of the company and not for a collateral purpose. This the defendant failed to exercise and his failure to do so is a blatant breach of his fiduciary duties.

[39] The law requires the defendant as a director of the plaintiff to do, act and behave as follows:

(i) exercise the powers vested as a director in the interests of the company;

(ii) must not exercise those powers as a director against the interests of the company; and

(iii) in exercising those powers by virtue of his position as a director he must always do so for the general interests of the company and nothing else.

[40] In the Privy Council case of *Brickenden v. London Loan and Savings Co* [1934] 3 DLR 465 a solicitor acting for the loan company had a personal interest in certain loans made to a customer of the company which, in breach of his fiduciary duty, he failed to disclose to the company. The trial judge entered judgment for the company. The Court of Appeal of Ontario set aside the judgment on the ground that no breach of duty had been proved, and that in any event the company had suffered no loss. The Supreme Court of Canada restored the judgment of the trial judge, and its decision was affirmed by the Privy Council. Giving the judgment of the Privy Council, Lord Thankerton said this (at p. 469):

> When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered his decision to proceed with the transaction, because the constituent's action would be solely determined by some other factor, such as the valuation by another party of the property proposed to be mortgaged. Once the Court has determined that the non-disclosed facts were material, speculation as to what course the constituent, on disclosure, would have taken is not relevant.

[41] The defendant had breached not only both the agreements but his fiduciary duties as a director of the plaintiff by failing to disclose and making use of the plaintiff's confidential information. He had used the company's asset, the Dell laptop from 23 December 2014 until 12 January 2015 to communicate and receive emails with regards to Amcen's business operations through his personal email. The defendant had conducted evaluation monitoring of Dynacraft Industries Sdn Bhd on 3 July 2014 and

A 4 July 2014 in his capacity as Associate Consultant of Amcen. There was also evidence that whilst still under the employment of the plaintiff, the defendant had registered the website of Amcen and that he was also the administrator.

[42] Furthermore, the defendant never denied that as an employee of the B plaintiff, he cannot divulge any of the affair, secret of the plaintiff, its personnel, financial status, management and administration, accounts, creditors, debtors, marketing and distribution, production and other matters concerning the business of the plaintiff to any other company, person or persons or any other company within the Texchem Group without the C previous consent in writing of the plaintiff.

[43] We are in full agreement with the submission of learned counsel for the plaintiff that the trial judge erred in failing to appreciate and consider the principles of fiduciary and whether the defendant as a fiduciary had breached his fiduciary duties as a Working Director and as a senior employee of the D plaintiff.

Conclusion

[44] In conclusion, after having heard the parties at length and upon careful perusal of the records of appeals, we were of the considered opinion that E appellate intervention was warranted.

[45] For the foregoing reasons, we unanimously allowed the appeal with costs. We set aside the decision of the High Court Judge and allowed para. 28 prayers (i), (ii), (iii), (iv), (vii) and (viii) of the statement of claim and we accordingly dismissed the counterclaim. We ordered that the F damages be assessed by the learned High Court Judge. We further ordered costs of RM20,000 here and below subject to payment of allocator fee.

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